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State v. Carmouche Petition For Review Dckt. 38554

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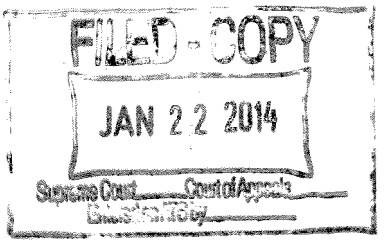

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	
Plaintiff-Appellant/Cross-Respondent,	NO. 38554
v.	CANYON COUNTY NO. CR 2010-16895
DARREN DUSTIN CARMOUCHE,	RESPONDENT'S/CROSS-APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW
Defendant-Respondent/ Cross-Appellant.	

STATEMENT OF THE CASE

Nature of the Case

Darren Dustin Carmouche asks the Idaho Supreme Court to review the opinion of the Idaho Court of Appeals, 2013 Opinion No. 62 (Ct. App. 2013) (*hereinafter*, Opinion). In Mr. Carmouche's cross-appeal[1], he asserted that the prosecutor at his trial

[1] The State originally filed a separate cross-appeal of the district court's acquittal of the persistent violator sentencing enhancement that was alleged at trial. The Idaho Court of Appeals dismissed the State's appeal as moot based upon Double Jeopardy grounds. (Opinion, pp.4-10.) The State has not sought review from this Court on the Idaho Court of Appeals' dismissal of its own appeal.

committed prosecutorial misconduct, rising to the level of a fundamental error, when the prosecutor argued that evidence of his assertion of his Fourth Amendment rights as substantive evidence of his guilt. The Court of Appeals assumed constitutional error that was plain from the record for purposes of its opinion, but found this error to be harmless. (Opinion, pp.10-12.)

However, in so doing, the Court of Appeals' prejudice analysis relied partially on other evidence that, "showed that Carmouche did not want the police to see or contact the victim," rather than focusing on other evidence – aside from a lack of desire to interact with police – that would tend to establish Mr. Carmouche's guilt beyond a reasonable doubt. (Opinion, p.12.) In essence, the Court of Appeals cited to other evidence that showed an unwillingness to speak to police as evidence of guilt, which is as much constitutional error as citing to an express invocation of one's Fourth or Fifth Amendment rights. Mr. Carmouche further submits that the remaining evidence relied on by the Court of Appeals in finding the error harmless was not sufficient to establish that the error did not contribute to Mr. Carmouche's verdicts. Because the prejudice analysis undertaken by the Court of Appeals in this case was not the proper analysis articulated under this Court's previous opinion in *State v. Perry*, Mr. Carmouche respectfully asks that this Court grant his petition for review and vacate his judgments of conviction and sentences.

Statement of the Facts & Course of Proceedings

Darren Carmouche was charged with attempted strangulation, second degree kidnapping, aggravated battery, and felony domestic violence. (R., pp.32-34, 57-59.) The State subsequently alleged four separate sentencing enhancements – three

persistent violator sentencing enhancements for the charges of attempted strangulation, kidnapping, and domestic violence, as well as an allegation that Mr. Carmouche used or attempted to use a deadly weapon during the commission of the alleged aggravated battery. (R., pp.41-43.) The State subsequently amended its allegations of sentencing enhancements to reflect four allegations that Mr. Carmouche was a persistent violator. (R., pp.60-64.)

At the jury trial in this case, the State presented the testimony of the alleged victim, Kirsteen Redmond. (Trial Tr.[2], p.71, Ls.12-15.) She testified that, at the time of the alleged altercation, she and Mr. Carmouche were living together. (Trial Tr., p.71, Ls.16-23.) Ms. Redmond testified that, on that day, she and Mr. Carmouche were using methamphetamine and had been for several days. (Trial Tr., p.73, Ls.6-10, p.109, Ls.1-5.) She claimed that she and Mr. Carmouche began fighting while high on methamphetamine. (Trial Tr., p.74, Ls.6-8.) The fight, according to Ms. Redmond, was based upon Mr. Carmouche's belief that she was having an affair with a man that the two of them worked with. (Trial Tr., p.74, Ls.9-12.) According to Ms. Redmond's testimony, the fight turned physical. (Trial Tr., p.74, Ls.17-23.)

Ms. Redmond testified that, when Mr. Carmouche was dissatisfied with the answers she was giving him to his questions about whether she was involved with this man, he started punching her in the face. (Trial Tr., p.74, L.19 – p.75, L.9.) By her estimate at trial, Mr. Carmouche punched her over 50 times throughout the fight. (Trial Tr., p.76, Ls.10-21.) She then claimed that Mr. Carmouche grabbed her head and

[2] For ease of reference, citations to the primary transcript of the trial proceedings in this case are made herein by reference to "Trial Tr." All other citations to the transcript are made by reference to the date of the proceeding transcribed.

slammed it into a wall, and then hit her in the chest and legs with the handle of a baseball bat. (Trial Tr., p.76, L.22 – p.78, L.7.) Ms. Redmond also testified that Mr. Carmouche grabbed her around the throat with both hands and choked her. (Trial Tr., p.78, L.16 – p.79, L.3.) When asked why she did not leave during the course of this fight, Ms. Redmond responded that Mr. Carmouche continually positioned himself between her and the door and threatened to kill her. (Trial Tr., p.79, Ls.7-15.) She further claimed that Mr. Carmouche threatened to kill her and her children if Ms. Redmond called the police. (Trial Tr., p.81, Ls.6-13.)

Ms. Redmond testified that, after the fight stopped, Mr. Carmouche made her some food and attempted to tend to her wounds. (Trial Tr., p.81, L.24 – p.82, L.4.) When police arrived later, she testified that she pretended to be asleep at first. (Trial Tr., p.85, L.19 – p.86, L.1.) According to Ms. Redmond's testimony, Mr. Carmouche had pulled the blanket over her head to cover her completely when police began knocking on the door and instructed her to feign sleep. (Trial Tr., p.86, Ls.2-9.)

Ms. Redmond admitted that she did not initially tell police officers that her injuries were caused by Mr. Carmouche upon eventually speaking to police. (Trial Tr., p.87, Ls.3-5.) She claimed that she first told police that she was injured falling down the stairs, then claimed that "people" had caused her injuries without specifying who. (Trial Tr., p.87, Ls.6-18.) Eventually, however, Ms. Redmond told police that Mr. Carmouche was the person who inflicted her injuries. (Trial Tr., p.89, Ls.14-25.) Ms. Redmond testified that her injuries included swelling around her face and ears, bruising all over her face, blood coming from her ear, some cuts on her scalp, chest pain, and a large bruise on her left thigh. (Trial Tr., p.90, Ls.6-13.) Ms. Redmond also testified that she

had a fractured rib. (Trial Tr., p.124, Ls.8-11.) She further testified that, following the alleged strangulation, her throat was tender, she had difficulty swallowing, and her voice was raspy for several weeks after that. (Trial Tr., p.93, Ls.1-18.)

With regard to her questioning by police, Ms. Redmond acknowledged that she was interrogated by two police officers for approximately an hour before claiming that Mr. Carmouche had harmed her. (Trial Tr., p.118, L.9 – p.119, L.25.) During this questioning, officers repeatedly suggested to Ms. Redmond that Mr. Carmouche was the source of her injuries. (Trial Tr., p.119, Ls.12-25.) She also testified that the officers made comments that Mr. Carmouche treated Ms. Redmond worse than their dog and that Mr. Carmouche could come back to kill her unless she told police that he harmed her. (Trial Tr., p.120, Ls.9-18.) However, Ms. Redmond denied that her accusations against Mr. Carmouche were the product of police coercion. (Trial Tr., p.125, L.21 – p.126, L.7.)

The State also presented the testimony of several law enforcement officers who were involved in the investigation of the charged offenses. First, the State presented the testimony of Officer Steven Uriguen of the Nampa Police Department. (Trial Tr., p.28, Ls.7-11.) Officer Uriguen was on patrol on the morning of the alleged altercation when he received a call for him to perform a welfare check regarding a potentially suicidal person. (Trial Tr., p.31, L.1 – p.32, L.7.) After unsuccessfully trying to find the man who placed a call to a suicide hotline, who Officer Uriguen knew as "Darren", the officer arrived at Mr. Carmouche's residence. (Trial Tr., p.32, L.2 – p.34, L.13.)

The officer initially received no response when he knocked on Mr. Carmouche's door. (Trial Tr., p.34, Ls.14-20.) After knocking harder, Officer Uriguen heard a male voice inside the home call out that everything was fine and the officer could leave. (Trial Tr., p.34, L.21 – p.35, L.5.) But Officer Uriguen told the man inside, subsequently identified as Mr. Carmouche, that he was not going to leave until the officer could verify that Mr. Carmouche was alright. Officer Uriguen further told Mr. Carmouche that the officer would break the door down if Mr. Carmouche did not come outside. (Trial Tr., p.35, L.22 – p.36, L.5.)

Mr. Carmouche then came out of his house to talk with the officers outside of his house. (Trial Tr., p.36, Ls.14-19.) Mr. Carmouche informed the police that he had called the suicide hotline, and explained that he was upset due to some individuals having "hit on" his girlfriend. (Trial Tr., p.37, Ls.16-24.) During Officer Uriguen's testimony, the prosecutor questioned the officer about the fact that Mr. Carmouche initially did not permit police to look into or enter his home during the initial point of his being questioned and that he had invoked his Fourth Amendment rights in the process. (Trial Tr., p.37, L.25 – p.39, L.1.)

Although Mr. Carmouche expressed to the officers that he did not wish them to enter his house, he did allow Officer Uriguen to open the front door and call out to Ms. Redmond. (Trial Tr., p.38, L.20 – p.39, L.3.) The prosecutor again elicited further testimony from Officer Uriguen regarding Mr. Carmouche not permitting officers to enter his home. (Trial Tr., p.39, Ls.4-14.) Eventually, the officer convinced Mr. Carmouche to permit Officer Uriguen to stick his head in the doorway to try to talk to Ms. Redmond. (Trial Tr., p.39, Ls.9-14.)

After the officer again called out to Ms. Redmond and received no response, Officer Uriguen convinced Mr. Carmouche to allow him to put more of his body inside the house to check for Ms. Redmond. (Trial Tr., p.39, L.19 – p.40, L.9.) From this vantage, Officer Uriguen testified that he could observe disarray in the living room, along Ms. Redmond, who was lying on the couch with her back to the officer. (Trial Tr., p.40, Ls.4-15.) Officer Uriguen once again told Ms. Redmond that she needed to come outside and talk to the officers. (Trial Tr., p.40, Ls.19-25.)

Ms. Redmond did not respond at first to the officer's commands. (Trial Tr., p.41, Ls.1-2.) Mr. Carmouche then began to encourage Ms. Redmond to come outside and speak with police. (Trial Tr., p.41, Ls.3-8.) After a time, Ms. Redmond came outside of the house wrapped in a blanket. (Trial Tr., p.41, Ls.9-12.) When she came outside, Officer Uriguen testified that he observed a large bruise over Ms. Redmond's left and right eyes, along with dried blood on her face and a scratch on her chest. (Trial Tr., p.41, Ls.13-18.) Later, the officer saw a large bruise on Ms. Redmond's leg. (Trial Tr., p.43, Ls.13-17.)

Because there were several officers at the scene, Officer Uriguen had two other officers wait outside with Mr. Carmouche, and then the officer went inside the house to question Ms. Redmond about her injuries. (Trial Tr., p.41, L.25 – p.42, L.20.) After talking with her for about an hour, Officer Uriguen called for paramedics to treat Ms. Redmond's injuries. (Trial Tr., p.42, L.21 – p.43, L.12.) The officer then questioned Mr. Carmouche briefly. (Trial Tr., p.50, Ls.14-20.) Although Mr. Carmouche did not initially reveal that Ms. Redmond was injured or explain how she was injured, he eventually stated that someone else had caused her injuries. (Trial Tr., p.50, L.21 –

p.51, L.4.) Officer Uriguen also received permission from Ms. Redmond to search the home. Inside, he found numerous items scattered around, as well as broken items, and a hole in one of the walls with what appeared to be blood nearby. (Trial Tr., p.44, L.15 – p.45, L.22.) Additionally, Officer Uriguen located a baseball bat in an upstairs room and saw clumps of hair in a bathroom garbage can. (Trial Tr., p.45, L.23 – p.46, L.3.)

Although the apartment looked to be in disarray, the officer could not testify as to whether this was the condition of the apartment at any time prior to the morning of the alleged altercation. (Trial Tr., p.61, Ls.19-22.) He also did not see any bloody rags, clothing, or signs of blood in any sink other than the small drop of what the officer believed to be blood near a hole in the wall. (Trial Tr., p.62, L.4 – p.64, L.21.)

Sergeant Mike Wagoner of the Nampa Police Department also testified on behalf of the State. (Trial Tr., p.129, Ls.11-13.) As with Officer Uriguen, Sergeant Wagoner responded to Mr. Carmouche's home on the morning of the alleged altercation. (Trial Tr., p.134, Ls.10-17.) When the officer arrived at the scene, officers were already standing outside with Mr. Carmouche. (Trial Tr., p.135, L.10 – p.136, L.18.) Mr. Carmouche did not appear to be agitated or aggressive toward the officers, and Sergeant Wagoner could not observe any marks or blood stains on him anywhere. (Trial Tr., p.152, Ls.7-19.)

Shorty thereafter, Sergeant Wagoner testified that his attention was diverted when Ms. Redmond also came out of the house. (Trial Tr., pp.9-18.) The officer testified that Ms. Redmond was walking slowly out of the apartment, as though she were in pain. (Trial Tr., p.318, Ls.11-17.) He also saw that her face was swollen and bruised. (Trial Tr., p.139, Ls.4-15.) Given her observable injuries, Sergeant Wagoner

and Officer Uriguen took Ms. Redmond inside the home to question her. (Trial Tr., p.139, L.24 – p.140, L.3.) This questioning took over an hour. (Trial Tr., p.140, Ls.4-6.)

During this questioning, Sergeant Wagoner testified that Ms. Redmond informed him that she had been struck by a bat. (Trial Tr., p.141, Ls.7-8.) Based on this, the officer located a baseball bat in an upstairs bedroom which Ms. Redmond stated was the bat that she had been hit with. (Trial Tr., p.141, L.6 – p.144, L.6.) The officer additionally testified that Ms. Redmond claimed that Mr. Carmouche slammed her head into a wall. (Trial Tr., p.145, Ls.5-9.) Sergeant Wagoner testified that he examined the wall in the kitchen, where Ms. Redmond claimed that this occurred, and that he did find a hole in the wall that was approximately the same height as Ms. Redmond's head. (Trial Tr., p.145, Ls.5-18.)

Another of the officers who responded to Mr. Carmouche's residence, Officer John Weirum, also testified at trial. (Trial Tr., p.176, Ls.7-12.) Officer Weirum is a crime scene investigator who was called to Mr. Carmouche's home. (Trial Tr., p.176, L.16 – p.178, L.17.) After initially waiting outside with Mr. Carmouche for over an hour, Officer Weirum walked through the house to videotape various items of interest. (Trial Tr., p.181, L.23 – p.183, L.5.) Among the items noted by the officer in his testimony were a small baseball bat that had been removed from an upstairs bedroom, a couple of clumps of hair on an ottoman and on the floor of the living room, and a small amount of what appeared to be blood in the kitchen. (Trial Tr., p.183, L.19 – p.184, L.16.) However, Officer Weirum was unable to say whether the swabs taken of what appeared to be blood were ever actually tested. (Trial Tr., p.190, Ls.5-15.)

On cross-examination, Officer Weirum testified that he had never been in Mr. Carmouche's apartment prior to the morning following the alleged altercation, and therefore could not say what the condition of the apartment had been before entering it. (Trial Tr., p.197, L.22 – p.198, L.5.) The officer further acknowledged that he was not aware of any testing for blood or fingerprints of any items within the home. (Trial Tr., p.199, Ls.11-16.) Officer Weirum also did not recall seeing any injuries on Mr. Carmouche during the time he was outside of the residence on that morning. (Trial Tr., p.203, Ls.16-18.)

Detective Troy Hale was the next witness presented by the State. (Trial Tr., p.222, L.24 – p.223, L.3.) Detective Hale interviewed Mr. Carmouche at the police station. (Trial Tr., p.225, L.13 – p.226, L.14.) According to the detective, when asked how Ms. Redmond acquired her injuries, Mr. Carmouche stated that he thought she had left the apartment in the middle of the night and came home injured. (Trial Tr., p.227, Ls.2-11.) When asked who he thought injured Ms. Redmond, Mr. Carmouche responded that he suspected two of his co-workers, but would not tell Detective Hale the names of these men. (Trial Tr., p.228, Ls.11-21.) According to the detective's testimony, Mr. Carmouche was skeptical when told that Ms. Redmond had told police that he was the source of her injuries. (Trial Tr., p.229, L.21 – p.230, L.9.) However, he admitted on cross-examination that Mr. Carmouche did not appear to be aggressive or angry towards Detective Hale during the interview. (Trial Tr., p.236, L.14 – p.237, L.15.)

Finally, the State presented the testimony of Detective Angela Weekes of the Nampa Police Department. (Trial Tr., p.244, Ls.7-16.) As the primary investigator in Mr. Carmouche's case, Detective Weekes was responsible for making decisions as to

how the investigation would proceed. (Trial Tr., p.280, Ls.19-24.) In this capacity, Ms. Weekes testified that she decided not to forensically test any material suspected of being blood, and not to test the baseball bat recovered by police for finger prints. (Trial Tr., p.282, L.10 – p.283, L.10.) She testified that she did not do so because none of the information received by police from either Mr. Carmouche or Ms. Redmond indicated that any individuals other than those two had been present in the home. (Trial Tr., p.283, L.19 – p.284, L.3.)

However, on cross-examination, Detective Weekes admitted she was aware that Ms. Redmond had, at one point, made statements that other people had been the ones to have perpetrated the assault against her. (Trial Tr., p.285, Ls.3-8.) The detective further acknowledged that evidence of another person's fingerprints on the bat could be exculpatory evidence. (Trial Tr., p.285, Ls.9-14.) Additionally, Detective Weekes testified that x-ray examinations of Mr. Carmouche's hands did not reveal any evidence of injuries, despite Ms. Redmond's claim that he had punched her more than 50 times over the course of several hours. (Trial Tr., p.286, L.10 – p.287, L.1.)

In addition to these officers, the State presented the testimony of Dr. Mark Burriesci, who was an emergency room physician who attended to Ms. Redmond's injuries. (Trial Tr., p.163, L.7 – p.165, L.9.) Dr. Burriesci testified that Ms. Redmond had bruising on her left ear, the left side of her face, and on the back of her head. (Trial Tr., p.168, Ls.12-18.) There was also bruising around her eyes and lacerations on her lip and right ear, along with a fractured tooth. (Trial Tr., p.168, Ls.16-21.) Dr. Burriesci testified that Ms. Redmond also had abrasions on her neck and complained of chest discomfort. (Trial Tr., p.168, Ls.22-24.) An x-ray revealed that one of Ms. Redmond's

ribs was fractured. (Trial Tr., p.169, Ls.15-25.) The doctor testified that Ms. Redmond also had scattered bruising throughout her body. (Trial Tr., p.168, L.25 – p.169, L.8.)

Following the presentation of the State's evidence, Mr. Carmouche presented the testimony of his alibi witness, Richard Damore. (Trial Tr., p.293, Ls.14-16.) He testified that he was a friend of Mr. Carmouche. (Trial Tr., p.294, Ls.3-13.) According to Mr. Damore, Mr. Carmouche was with him at the time of the charged offenses. (Trial Tr., p.294, L.21 – p.295, L.2.) He testified that he had picked Mr. Carmouche up a couple of days before the charged offenses. According to Mr. Damore's testimony, he saw Ms. Redmond on the morning he picked up Mr. Carmouche, and she had no observable injuries at that time. (Trial Tr., p.295, L.3 – p.296, L.6.) He then drove Mr. Carmouche back to the place where he was staying at the time – in a shed behind a house – where the two men did methamphetamine over the course of the next two days. (Trial Tr., p.296, L.7 – p.299, L.3.)

Mr. Damore testified that, upon returning to Mr. Carmouche's home, the residence was in a state of disarray and Ms. Redmond looked "battered." (Trial Tr., p.299, L.10 – p.300, L.4.) Ms. Redmond was also very angry with Mr. Carmouche for being gone. (Trial Tr., p.299, L.21 – p.300, L.4.) Given the fact that Ms. Redmond looked injured, coupled with her angry response towards Mr. Carmouche, Mr. Damore then left Mr. Carmouche's home. (Trial Tr., p.300, Ls.5-15.)

Mr. Damore did admit that, in addition to being close friends with Mr. Carmouche, the two were also incarcerated together prior to his trial. (Trial Tr., p.298, Ls.7-11, p.303, Ls.7-21.) He denied that he and Mr. Carmouche discussed Mr. Carmouche's pending charges while they were incarcerated. (Trial Tr., p.303, L.12 – p.304, L.9.)

Mr. Damore further claimed that no one witnessed Mr. Carmouche during the time that Mr. Carmouche was staying with Mr. Damore. (Trial Tr., p.304, Ls.18-21.) This included the woman who owned the home behind which they were staying. (Trial Tr., p.306, Ls.12-16.) In addition, Mr. Damore denied that Mr. Carmouche had sought to induce him to testify falsely in Mr. Carmouche's trial. (Trial Tr., p.312, L.22 – p.315, L.10.)

Mr. Carmouche also testified on his own behalf. (Trial Tr., p.326, Ls.8-13.) He testified, as was testified by Mr. Damore, that he was with Mr. Damore at the time of the alleged offenses; and that he only became aware of Ms. Redmond's injuries upon returning home thereafter. (Trial Tr., p.326, L.21 – p.328, L.12.) Mr. Carmouche testified that Ms. Redmond was very angry that he had not been home, and Mr. Damore left because of this. (Trial Tr., p.329, Ls.5-23.) According to Mr. Carmouche's testimony, Ms. Redmond told him that, on the prior evening, she had invited two other men over while he was gone and she was injured by them. (Trial Tr., p.330, Ls.13-18.) Although he tried to get Ms. Redmond to go to police several times, Mr. Carmouche testified that this did not happen. (Trial Tr., p.330, L.25 – p.331, L.7.) Eventually, he and Ms. Redmond argued. (Trial Tr., p.331, Ls.8-20.) Mr. Carmouche testified that he called a suicide hotline as a result of this argument. (Trial Tr., p.331, L.21 – p.332, L.16.) Mr. Carmouche denied having struck, choked, or threatened Ms. Redmond. (Trial Tr., p.335, Ls.9-25.) He further testified that he had lied to police when he claimed to have been home the previous night – according to Mr. Carmouche, he was worried about the potential consequences of his drug use and therefore lied because he was scared. (Trial Tr., p.336, L.12 – p.337, L.10.)

On cross-examination, the State questioned Mr. Carmouche about the inconsistencies between his trial testimony and his prior statements to police, as well as his failure to provide police with the alibi that he testified to at trial. (Trial Tr., p.349, L.23 – p.355, L.1.) Mr. Carmouche also admitted that he had sent Ms. Redmond a letter while incarcerated in which he apologized to her. (Trial Tr., p.355, Ls.9-22.) Mr. Carmouche claimed that he apologized to Ms. Redmond out of guilt for not having been there at the time she was injured. (Trial Tr., p.359, L.15 – p.360, L.6.)

The State then called a rebuttal witness to the stand, Andrea Deaugustineo. (Trial Tr., p.367, Ls.16-17.) Ms. Deaugustineo owned the home where Mr. Damore claimed to have been staying with Mr. Carmouche at the time of the alleged offenses. (Trial Tr., p.367, Ls.20-21.) While she acknowledged that Mr. Damore stayed behind her house in a shed, Ms. Deaugustineo denied that she had ever seen Mr. Carmouche there. (Trial Tr., p.368, L.14 – p.370, L.6.)

During closing arguments, the State referenced the fact that Mr. Carmouche closed the door behind him when he first went outside his home to talk to police. (Trial Tr., p.378, Ls.6-7.) The prosecutor then continued:

> When they asked about his girlfriend he had a fight with, well, she's asleep. You can't see her. **I know my rights. You can't go in. Why? Why, if he came home and found her beaten this way and heard these stories? Would that be your response?**

(Trial Tr., p.378, Ls.8-12 (emphasis added).)

The jury convicted Mr. Carmouche of attempted strangulation, kidnapping, aggravated battery, and felony domestic battery. (Trial Tr., p.410, L.24 – p.411, L.8; R., pp.133-135.) Thereafter, Mr. Carmouche proceeded to a bench trial on the State's persistent violator allegations. (11/12/10 Tr., p.1, Ls.5-20.) During this trial, the State

presented evidence of Mr. Carmouche's driver's license, and attempted to put into evidence an ILETS report regarding his driver's license information that included his social security number. (11/20/10 Tr., p.20, L.7 – p.31, L.10.) Although the officer testifying for the State claimed that she was familiar with how to run a criminal history check using this program, she admitted that she was not the custodian of these records, these records were not kept by the Nampa Police Department itself, and the officer was not even familiar with what the acronym "ILETS" stood for. (11/20/10 Tr., p.32, L.3 – p.33, L.17.) Although Mr. Carmouche did not object to the prior testimony during which the officer recited what the ILETS report indicated his social security number to be, the State's request for the admission of the ILETS report itself was withdrawn by the State in the face of Mr. Carmouche's hearsay objection. (11/20/10 Tr., p.31, L.4 – p.35, L.5.)

Following the presentation of the State's evidence, the district court determined that the State had "barely" met its burden of establishing the prior convictions necessary to sustain the State's persistent violator allegations. (11/20/10 Tr., p.60, Ls.13-19.) The trial court then indicated its intent to enter a judgment reflecting such. (11/20/10 Tr., p.60, Ls.13-19.)

However, no such judgment or order was ever entered. Instead, the district court subsequently entered a written order of its factual findings and legal conclusion that Mr. Carmouche was **not** a persistent violator of the law. (R., pp.156-162.) After reviewing the testimony and evidence presented, the district court determined that its prior consideration of the officer's testimony as to the contents of the ILETS report was in error. (R., p.156.) The district court ultimately held that the State had not presented sufficient evidence to establish Mr. Carmouche's identity as the subject of the prior

alleged felony convictions. (R., pp.158-162.) Accordingly, the district court entered an order acquitting Mr. Carmouche of these allegations. (R., pp.162, 180-181.)

Mr. Carmouche was sentenced to 15 years, with four years fixed, for each of his convictions of attempted strangulation, second degree kidnapping, and aggravated battery. For his conviction of domestic battery with traumatic injury, Mr. Carmouche received a sentence of 10 years, with six years fixed. (6/20/11 Tr., p.54, L.15 – p.55, L.6; R., pp.299-300.) Each of these sentences was ordered to run concurrently. (6/20/11 Tr., p.55, Ls.7-8; R., p.300.)

The State filed a timely notice of appeal from the district court's judgment of acquittal on the persistent violator sentencing enhancement allegation. (R., p.212.) Mr. Carmouche likewise timely appealed from his judgments of conviction and sentences. (R., p.309.)

On appeal, the Court of Appeals determined that the relief sought by the State in its appeal – i.e. a retrial or entry of a judgment of conviction on the persistent violator allegation – was barred under the operation of the Double Jeopardy clause of the Fifth Amendment given the trial court's factual acquittal of Mr. Carmouche on this allegation. (Opinion, pp.4-10.) With respect to Mr. Carmouche's claim of prosecutorial misconduct, the Court of Appeals assumed both that constitutional error had been established and that this error was plain from the record. (Opinion, pp.10-12.) However, the Court of Appeals deemed this error to be harmless. (Opinion, p.12.) This petition for review timely followed.

ISSUE

Should this Court grant Mr. Carmouche's petition for review and reverse his judgments of conviction and sentences because the prosecutor committed misconduct, rising to the level of a fundamental error, when the prosecutor argued evidence of Mr. Carmouche's refusal to permit police to enter his home as supporting an inference of guilt of the charged offenses?

ARGUMENT

This Court Should Grant Mr. Carmouche's Petition For Review And Reverse His Judgments Of Conviction And Sentences Because The Prosecutor Committed Misconduct, Rising To The Level Of A Fundamental Error, When The Prosecutor Argued Evidence Of Mr. Carmouche's Refusal To Permit Police To Enter His Home As Supporting An Inference Of Guilt Of The Charged Offenses

A. Introduction

The prosecutor in this case elicited testimony from police officers that Mr. Carmouche initially refused to permit police to enter and search his home. In closing arguments, the prosecutor urged the jury to consider this fact as evidence indicating Mr. Carmouche's guilt of the charged offenses. Although the Idaho Court of Appeals assumed that these facts established constitutional error that was plain on the face of the record, the Court of Appeals held that this error was harmless in part because there was additional evidence at trial that also demonstrated Mr. Carmouche did not want to talk to police or wish them to enter into his home. Mr. Carmouche submits that the Court of Appeals engaged in an incorrect analysis of the prejudice prong of the fundamental error test. He further submits that, under the correct legal standards, the evidence demonstrates a reasonable possibility that the prosecutor's improper argument contributed to the verdict and was therefore this misconduct was not harmless.

B. Standard of Review

Because there was no contemporaneous objection to the elicitation of the testimony, and to the prosecutor's closing argument, that are being challenged in this appeal, this Court reviews Mr. Carmouche's allegation of prosecutorial misconduct under the three-part test for fundamental error articulated in *State v. Perry*, 150 Idaho

209, 226 (2010). Under this standard, fundamental error is established and reversal is required if the defendant can establish that: (1) the alleged error violates one or more of the defendant's unwaived constitutional rights; (2) the error is clear and obvious from the record; and (3) there is a reasonable possibility that the error affected the outcome of the trial proceedings. *Perry*, 150 Idaho at 226.

C. This Court Should Grant Mr. Carmouche's Petition For Review And Reverse His Judgments Of Conviction And Sentences Because The Prosecutor Committed Misconduct, Rising To The Level Of A Fundamental Error, When The Prosecutor Argued Evidence Of Mr. Carmouche's Refusal To Permit Police To Enter His Home As Supporting An Inference Of Guilt Of The Charged Offenses

In this case, the prosecutor both elicited testimony from police officers that Mr. Carmouche had initially refused to permit police to enter his home, and subsequently argued this evidence to the jury during closing arguments as proof of Mr. Carmouche's guilt. Mr. Carmouche asserts that this improper questioning and argument constituted prosecutorial misconduct rising to the level of a fundamental error.

The prosecutor, in presenting the testimony of Officer Uriguen in this case, intentionally elicited testimony regarding Mr. Carmouche having invoked his Fourth Amendment right against the warrantless entry of the officers into his home. (Trial Tr., p.37, L.25 – p.39, L.1, p.39, Ls.4-14.) During closing arguments, the prosecutor further noted that Mr. Carmouche closed the door behind him when he first went outside to speak with police. (Trial Tr., p.378, Ls.6-7.) The prosecutor then argued to the jury:

> When asked about his girlfriend he had a fight with, well, she's asleep. You can't see her. **I know my rights. You can't go in. Why? Why, if he came home and found her beaten this way and heard these stories? Would that be your response?**

(Trial Tr., p.378, Ls.8-12 (emphasis added).) In repeatedly asking the jurors in this case what reason Mr. Carmouche would have for refusing to consent to let police search his home, coupled with asking jurors whether they – as innocent parties to the charged offense – would have done the same, the prosecutor was implying that Mr. Carmouche's invocation of his Fourth Amendment right stood as proof of his guilt. The direct inference to the jury was that an innocent person would not have refused to permit police entry to search his or her home. This was misconduct.

As to the first prong of the *Perry* analysis, Mr. Carmouche asserts that the misconduct in this case violated his right to a fair trial and his Fourth Amendment right to refuse to consent to police searches.

The Fifth Amendment to the United States Constitution states that, "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. Similarly, the Fourteenth Amendment states, "[n]o state shall...deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV. Additionally, the Idaho Constitution also guarantees that, "[n]o person shall be...deprived of life, liberty or property without due process of law." ID. CONST. art. I, §13. Due process requires criminal trials to be fundamentally fair. *Schwartzmiller v. Winters,* 99 Idaho 18, 19 (1978).

The Idaho Supreme Court has recently reiterated, in the context of a prosecutorial misconduct claim, "'Every person accused of crime in Idaho has the right to a fair and impartial trial.'" *State v. Christiansen*, 144 Idaho 463, 469 (Ct. App. 2007) (quoting *State v. Sharp*, 101 Idaho 498, 504 (1980)). "'It is the duty of the prosecutor to see that a defendant has a fair trial, and that nothing but competent evidence is

submitted to the jury.'" *Id.* (quoting *State v. Irwin*, 9 Idaho 35, 44 (1903)). "Prosecutors too often forget that they are a part of the machinery of the court, and that they occupy an official position, which necessarily leads jurors to give more credence to their statements, action, and conduct in the course of the trial and in the presence of the jury than they would give to counsel for the accused." *Irwin*, 9 Idaho at 44. Prosecutors "should not 'exert their skill and ingenuity to see how far they can trespass upon the verge of error, [because] generally in so doing they transgress upon the rights of the accused.'" *Id.* Moreover, a prosecutor "should never seek by any artifice to warp the minds of the jurors by inferences or insinuations." *Id.*

In *Christiansen*, the Idaho Supreme Court addressed a prosecutor's act of eliciting testimony regarding Christiansen's refusal to consent to a search of his business. *Id.* Christiansen was charged with numerous arson-related counts after his business burned down in the middle of the night. *Id.* at 464-465. During the questioning of one of the police officers who interrogated Christiansen, the prosecutor asked whether the officer asked Christiansen for permission to search the property. *Id.* at 465. The officer responded that he had and that Christiansen refused to give consent to the search. *Id.*

On appeal, the *Christiansen* Court first held that although no contemporaneous objection was made to the testimony, the error was fundamental. *Id.* at 470-471. The Court deemed the improper testimony as being analogous to those cases where a prosecutor use of a defendant's silence as evidence of guilt. *Id.* at 470. The *Christiansen* Court stated, "The same rationale that precludes evidence of an accused's assertion of his or her Fifth Amendment Rights offered for the purpose of either

impeachment or inferring guilt precludes evidence of the accused's assertion of his or her Fourth Amendment rights offered for the same purpose." *Id.* The Court then concluded that the prosecutor committed misconduct in Christiansen's case: "There was no excuse for the prosecuting attorney seeking to elicit Sergeant Clark's opinion as to Christiansen's veracity during police interrogation or testimony that Christiansen refused consent to a search of his business premises. The prosecuting attorney's actions were clearly misconduct." *Id.* at 471.

A prosecutor's elicitation of testimony regarding a defendant's invocation of his Fourth Amendment right to be free of warrantless searches, and subsequent use of that evidence in closing argument to support an inference of guilt, have since and consistently been recognized as a violation of due process that may provide the basis to support a finding of fundamental error. *See State v. Wright*, 153 Idaho 478, 488-489 (Ct. App. 2012); *State v. Betancourt*, 151 Idaho 635, 639-641 (Ct. App. 2011). The *Wright* Court noted that, "eliciting testimony from a witness regarding a defendant's refusal to consent to a search, when used for purposes of inferring guilt, is prosecutorial misconduct and may be fundamental error."[3] *Wright*, 153 Idaho at 489.

The use of this evidence as proof of guilt by the prosecutor during closing arguments in this case is similar to that present in *Betancourt*, as both the prosecutor's

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[3] While the *Wright* Court ultimately found that fundamental error had not been established, this conclusion was only due to the fact that the defendant in *Wright* had not established the violation of any reasonable expectation of privacy that would be protected under the Fourth Amendment – and therefore the alleged "search" did not implicate the Fourth Amendment. *Wright*, 153 Idaho at 489-490. In contrast, the invocation of Mr. Carmouche's Fourth Amendment right in this case was directed against a search of Mr. Carmouche's home – and a "person's home 'is accorded the full range of Fourth Amendment protections.'" *See State v. Johnson*, 110 Idaho 516, 523 (1986) (quoting *Lewis v. United States*, 385 U.S. 206, 211 (1966)).

remarks in *Betancourt* and those made by the prosecutor in this case called upon the jury to evaluate whether a refusal to permit police to search a premises was inconsistent with the actions of a person innocent of the charged offense. *See Betancourt*, 151 Idaho at 639-640. These remarks were deemed in *Betancourt* to meet the first prong of the *Perry* test for fundamental error, "because the prosecutor's comments during closing argument and rebuttal violated Betancourt's right to a fair trial." *Id.* at 640.

And, just as in *Betancourt*, the due process violation in this case is clear from the record. By expressly arguing Mr. Carmouche's invocation of his constitutional rights, and then asking the jury why he would do so if he were innocent – even more, whether they themselves would do so if they were in Mr. Carmouche's place – the prosecutor was drawing a direct line between Mr. Carmouche's invocation of his Fourth Amendment rights and the conclusion that he did so due to his guilt of the charged offense. Accordingly, the second prong of the *Perry* test for fundamental error has been met.

Finally, contrary to the holding of the Court of Appeals in this case, the improper argument by the prosecutor regarding Mr. Carmouche's invocation of his Fourth Amendment rights for purposes of inferring guilt cannot be said to be harmless beyond a reasonable doubt. From the outset, the Court of Appeals appears to have relied in substantial part on evidence of Mr. Carmouche's reluctance to speak with police or have them enter his home as proof of guilt. In support of its finding of harmlessness, the court cited specifically to evidence that Mr. Carmouche did not want to exit his residence to talk to police and that he shut the door to his residence once he did so. (Opinion, p.12.) This is merely further evidence of Mr. Carmouche's exercise of his

rights both to remain silent under the Fifth Amendment and to avoid police intrusion into his home under the Fourth Amendment. As has been noted, evidence of the assertion of one's constitutional rights cannot be properly relied upon as proof of guilt. Accordingly, to the extent that the Court of Appeals is seeking to rely on additional evidence of Mr. Carmouche's invocation of his rights when confronted by police, this evidence should likewise not be considered as proof of guilt.

Moreover, the analysis conducted by the Idaho Court of Appeals in finding this error harmless was more akin to a sufficiency of the evidence analysis as opposed to the harmless error test mandated by this Court in *Perry*. From the outset, the Court of Appeals in this case framed this test as one requiring Mr. Carmouche to establish that the error on the part of the prosecutor **actually** altered the proceedings, rather than establishing a reasonable possibility that this was the case. The Court of Appeals began its harmlessness analysis with the following statement, "We nevertheless conclude that Carmouche is not entitled to relief because he has not **established that the error affected the outcome of the trial proceedings** to his prejudice." (Opinion, p.12 (emphasis added).) After reciting the remaining evidence in the record that generally supported the jury's verdict, the court then reiterated that Mr. Carmouche had not shown that the misconduct at issue, "**affected the outcome of the proceedings**." (Opinion, p.12 (emphasis added).) This differs from the legal standard articulated by this Court, which places the onus on the defendant to show a **reasonable possibility** that the error complained of contributed to the verdict. *Perry*, 150 Idaho at 226.

To understand the difference between these standards, it is helpful to trace the "reasonable possibility" standard back to its roots in United States Supreme Court case

law. The most prominent application and articulation of this standard comes from the seminal case of *Chapman v. California*, in which the Court held that the standard for whether a constitutional error is harmless is whether there is, "'a reasonable possibility that the evidence complained of contributed to the conviction.'" *Chapman v. California*, 386 U.S. 18, 23 (1967) (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)). Thus, the legal standard for what constitutes a harmless error appears to be the same under *Perry* for both objected-to and non-objected-to errors – the salient difference is merely who bears the burden of proof of prejudice and the standard of proof that is required. Compare *Chapman*, 386 U.S. at 23-24; *Perry*, 150 Idaho at 226.

This standard, as set forth in *Chapman*, has its roots in the prior U.S. Supreme Court Opinion of *Fahy*. And the *Fahy* Court makes absolutely clear that this is **not** a test for the sufficiency of the remaining evidence to support the verdict:

> We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the verdict.

Fahy, 375 U.S. at 86-87.

In addition to conducting a prejudice analysis that was essentially a review of whether the remaining evidence was sufficient to convict Mr. Carmouche, which has been held to be the wrong standard under U.S. Supreme Court case law, the Court of Appeals additionally required Mr. Carmouche to **actually** establish that the improper comments of the prosecutor contributed to the verdict, as opposed to a reasonable possibility of such. Because the Idaho Court of Appeals applied the incorrect legal standards in this case, Mr. Carmouche asks that this Court grant his Petition for Review.

Under a proper application of the harmless error analysis under *Perry*, there is a reasonable possibility that the misconduct in this case contributed to the verdicts. There was substantial dispute at trial as to the source of Ms. Redmond's injuries. Mr. Carmouche consistently contended that they were inflicted by other individuals and further denied that he had struck, strangled, or otherwise threatened Ms. Redmond. (Trial Tr., p.326, L.8 – p.364, L.19.) By Ms. Redmond's own statements to police, "other people" were the source of her injuries. (Trial Tr., p.87, Ls.12-18, p.154, L.2 – p.155, L.7.) It was only after protracted questioning by police, who suggested Mr. Carmouche as the source of her injuries, that Ms. Redmond implicated Mr. Carmouche as the individual who inflicted her wounds. (Trial Tr., p.118, L.9 – p.119, L.25, p.154, L.2 – p.155, L.7.)

Additionally, the evidence at trial showed that Mr. Carmouche did not have any blood on his person at the time police arrived at his home, nor did he have any observable injuries to his hands. (Trial Tr., p.76, Ls.10-21.) Actual x-ray examinations of his hands that were subsequently conducted likewise did not show any injuries. (Trial Tr., p.286, L.10 – p.287, L.1.) This evidence casts strong doubt on the State's allegations that Mr. Carmouche repeatedly hit Ms. Redmond with a closed fist – by her estimate, over 50 times – over the course of many hours. (Trial Tr., p.76, Ls.10-21.)

The prosecutorial misconduct in this case violated Mr. Carmouche's due process right to a fair trial, and was apparent from the face of the record. Moreover, given the conflicting evidence presented at trial as to the source of Ms. Redmond's injuries, there is a reasonable possibility that this misconduct contributed to the jury's verdict.

Accordingly, Mr. Carmouche asserts that the prosecutorial misconduct in this case rose to the level of a fundamental error entitling him to a new trial.

CONCLUSION

Mr. Carmouche respectfully requests that this Court grant his Petition for Review. If granted, Mr. Carmouche further asks that this Court reverse his judgment of conviction and sentences for attempted strangulation, kidnapping, aggravated battery, and felony domestic battery and remand this case for further proceedings in light of the prosecutorial misconduct that occurred in this case.

DATED this 22nd day of January, 2014.

SARAH E. TOMPKINS
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of January, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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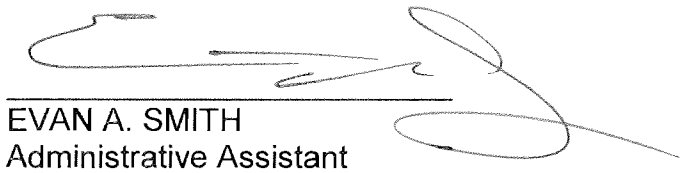

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